The Right to a Jury Trial for Misdemeanor Offenses in Arizona

All defendants charged with felony offenses in Arizona are entitled to jury trials. Every felony in Arizona carries a possible sentence of at least one year of prison. *See* A.R.S. § 13-702. Such offenses would carry the right to a jury trial in federal court under *Blanton v. City of North Las Vegas*, 489 U.S. 538 (1989). In *Duncan v. State of Louisiana*, 391 U.S. 145, 149-50 (1968), the United States Supreme Court held, "[T]he Fourteenth Amendment guarantees a right of jury trial in all criminal cases which – were they to be tried in a federal court – would come within the Sixth Amendment's guarantee."

However, "Arizona has long provided its citizens with greater access to jury trials than is required by the federal constitution." *State ex rel. McDougall v. Strohson (Cantrell, Real Party in Interest)*, 190 Ariz. 120, 121-22, 945 P.2d 1251, 1252-53 (1997). Article 2, § 23 of the Arizona Constitution states:

> The right of trial by jury shall remain inviolate. Juries in criminal cases in which a sentence of death or imprisonment for thirty years or more is authorized by law shall consist of twelve persons. In all criminal cases the unanimous consent of the jurors shall be necessary to render a verdict. In all other cases, the number of jurors, not less than six, and the number required to render a verdict, shall be specified by law.

Further, Art. 2, § 24 states, “In criminal prosecutions, the accused shall have the right to . . . a speedy public trial by an impartial jury . . . .” These constitutional provisions do not create a right to trial by jury; instead, they preserve whatever rights to a jury trial that existed at common law prior to statehood. *Crowell v. Jejna*, 215 Ariz. 534, 537, ¶ 7, 161 P.3d 577, 580 (App. 2007).

A.R.S. § 21-102 reiterates the Article 2, § 23 requirement for unanimity of jurors in criminal cases and the right to a trial by jury for offenses bearing a potential penalty of thirty years or more in prison. That statute also provides that in other cases in criminal courts of record, juries shall consist of eight persons, or six persons in courts not of record. Thus, in all Arizona criminal trials, whether for misdemeanors or felonies, jury verdicts must be unanimous.

A.R.S. § 22-320 states: “A trial by jury shall be had if demanded by either the state or defendant. Unless the demand is made at least five days before commencement of the trial, a trial by jury shall be deemed waived.” Despite this broad language, however, a jury trial is not required in every case. Rather, this statute is procedural and means only that a trial by jury shall be had if demanded in cases where a jury trial is appropriate. *Goldman v. Kautz*, 111 Ariz. 431, 432, 531 P.2d 1138, 1139 (1975).

The right to a jury trial in Arizona applies only to serious offenses, not to petty offenses.[1] *Benitez v. Dunevant*, 198 Ariz. 90, 92-93, ¶ 4, 7 P.3d 99, 101-102 (2000); *State ex rel. Dean v. Dolny,* 161 Ariz. 297, 778 P.2d 1193 (1989), *overruled on other grounds by Derendal v. Griffith*, 209 Ariz. 416, 104 P.3d 147 (2005); *Rothweiler v. Superior Court,* 100 Ariz. 37, 410 P.2d 479 (1966), *overruled in part by Derendal v. Griffith*, 209 Ariz. 416, 104 P.3d 147 (2005).

The "remain inviolate" clause in Article 2, § 23 of the Arizona Constitution has engendered much litigation in Arizona. This section has been interpreted to mean that any defendant charged with an offense for which he would have been entitled to a jury trial in Arizona before statehood is entitled to a jury trial today. "Jury eligibility focuses on the offense, not the defendant." *Benitez v. Dunevant*, 198 Ariz. at 94, ¶ 11, 7 P.3d at 103. In making this inquiry, courts focus on the elements of the offense, not on the facts of an individual case. *Urs v. Maricopa County*

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[1] "Petty offense" in this context is a term of art. Although A.R.S. § 13-105(30) defines "petty offense" as "an offense for which a sentence of a fine only is authorized by law," in the jury trial context, "petty offense" means a criminal offense that is punishable by six months or less of imprisonment and is therefore presumptively not jury-eligible. *See Blanton v. City of North Las Vegas*, 489 U.S. 538, 543 (1989); *Manic v. Dawes*, 213 Ariz. 252, 253, ¶ 3,141 P.3d 732, 733 (App. 2006).

Attorney's Office, 201 Ariz. 71, 72-73, ¶ 4, 31 P.3d 845, 846-47 (App. 2001).

Arizona formerly applied a three-part test, established by *Rothweiler v. Superior Court*, 100 Ariz. 37, 42, 410 P.2d 479, 483 (1966), *overruled in part by Derendal v. Griffith*, 209 Ariz. 416, 104 P.3d 147 (2005), to determine if a nonfelony offense required a jury trial. Under *Rothweiler*, the courts had to consider three factors, any one of which would independently require a jury trial:

> 1. The severity of the penalty that could be inflicted for the offense;
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> 2. The moral quality or "moral turpitude" of the act[2]; and
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> 3. The relationship of the act to common-law crimes.

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[2] The "moral turpitude" prong of the *Rothweiler* test looked to the nature of the offense, referring to such offenses as the conduct of a "depraved and inherently base person," *O'Neill v. Mangum*, 103 Ariz. 484, 485, 445 P.2d 843, 844 (1968); conduct adversely reflecting on the actor's "honesty, integrity or personal values," *State ex rel. Dean v. Dolny*, 161 Ariz. 297, 300 n. 3, 778 P.2d 1193, 1196 n. 3 (1989), *overruled by Derendal*, 209 Ariz. 416, 104 P.3d 147; and conduct indicating a "readiness to do evil, that is … conduct which would support an inference of a witness's readiness to lie." *Mungarro v. Riley*, 170 Ariz. 589, 590, 826 P.2d 1215, 1216 (App. 1991)**,** *overruled by Derendal*, 209 Ariz. 416, 104 P.3d 147. *See also Campbell v. Superior Court*, 186 Ariz. 526, 528, 924 P.2d 1045, 1047 (App. 1996) (Cruelty to animals, in the context in which it occurred in that case, was not a crime of "moral turpitude" because defendant's acts were "simply thoughtless expediency;" thus, no jury trial was required).

Any one of the three prongs of the *Rothweiler* test was "independently sufficient to give rise to a jury trial." *State v. Harrison*, 164 Ariz. 316, 317, 792 P.2d 779, 780 (App. 1990); *Frederickson v. Superior Court*, 187 Ariz. 273, 274, 928 P.2d 697, 698 (App. 1996).

In *Derendal v. Griffith*, 209 Ariz. 416, 104 P.3d 147 (2005), however, the Arizona Supreme Court partially reversed *Rothweiler* and adopted a modified form of the test established by *Blanton*. The Court noted the problems that the "moral quality" test had engendered, stating, "As the 'moral quality' test became more subjective and ambiguous, inconsistent outcomes resulted." *Id.* at 424, ¶ 31, 104 P.3d at 155. *Derendal* therefore abolished the "moral quality" prong of the *Rothweiler* test. Instead, determining if a misdemeanor offense is jury-eligible now requires a two-step analysis. First, if the misdemeanor offense has substantially similar elements with a common law antecedent that was guaranteed a jury trial when Arizona became a state, the defendant has a right to a jury trial. On the other hand, if the offense has no common law antecedent and is a misdemeanor punishable by no more than six months in jail, Arizona courts will now presume that the offense is a "petty offense" that does not require a jury trial.

Nevertheless, under *Derendal*, the Arizona Supreme Court explained that a defendant may rebut that presumption by showing that the offense is "serious" because it carries an additional serious consequence. To do so, the defendant must establish three things:

> (1) the penalty arises directly from statutory Arizona law;
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> (2) the consequence is "severe;" and
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> (3) the consequence applies uniformly to all persons convicted of that particular offense.

The *Derendal* Court explained that jury eligibility was not based on an analysis of the individual defendant before the court, but on the nature of the offense and its potential penalties. In other words, when determining the right to jury trial, the Court was concerned with the seriousness of the offense, rather than with the impact of a conviction on an individual defendant. The Court explained that, for example, jury eligibility would not turn on the effect a conviction might have upon a defendant's ability to obtain or maintain certain professional licenses, because such a consequence does not affect all defendants convicted of an offense. *Derendal v. Griffith* at 423, ¶ 25, 104 P.3d at 154, *citing State ex rel. McDougall v. Strohson (Cantrell)*, 190 Ariz. 120, 125, 945 P.2d 1251, 1256 (1997).

In *Fushek v. State*, 218 Ariz. 285, 289-90, ¶ 16, 183 P.3d 536, 540-41 (2008), the Arizona Supreme Court held that "uniformly applied" in the *Derendal* context meant uniformly *available*. In *Fushek*, the defendant was charged with misdemeanor disorderly conduct and contributing to the delinquency of a minor. The State had filed allegations of sexual motivation, and, if the defendant was convicted and the State proved these allegations beyond a reasonable doubt, the trial court would then have discretion to order him to register as a sex offender. The State argued that because sex offender registration was discretionary, it was not "uniformly applied" under *Derendal*. The Court disagreed, stating:

> The fact that the trial judge is not required upon a finding of sexual motivation to impose sex offender registration does not mean that the potential consequence is not uniformly applied. It is enough that all defendants in such a position face the possibility of the consequence. The maximum potential sentence determines whether a defendant has a right to a jury trial, even if the judge retains discretion to impose a lesser penalty.

Fushek at 289-90, ¶ 16, 183 P.3d at 540-41. Thus, under *Fushek*, a defendant charged with misdemeanor offenses that may require the defendant to register a sex offender are eligible for jury trials.

Arizona courts thus must analyze the common law as it existed at the time the Arizona Constitution was adopted in determining whether misdemeanor offenses are jury-eligible. This is a difficult and time-

consuming process. *See* Hon. George T. Anagnost, *Trial By Jury And "Common Law" Antecedents: What Hath Derendal Wrought?*, 43 Ariz. Att'y 38, 40 (Nov. 2006).

Arizona cases finding that there was no common law antecedent for crimes, and therefore no right to a jury trial for misdemeanor offenses, include State *v. Willis*, 218 Ariz. 8, 11, ¶ 12, 78 P.3d 480, 483 (App. 2008) (defendant charged with misdemeanor trespass was not entitled to a jury trial "because criminal trespass at common law had breach of the peace as an element of the offense, which the modern statutory offense does not require"); *Stoudamire v. Simon*, 213 Ariz. 296, 299, 141 P.3d 776, 779 (App. 2006) (no jury trial for misdemeanor possession of marijuana]; *Phoenix City Prosecutor's Office v. Klausner*, 211 Ariz. 177, 179, ¶ 6, 118 P.3d 1141, 1143 (App. 2005) (no jury trial for misdemeanor assault); *Ottaway v. Smith*, 210 Ariz. 490, 494, ¶ 14, 113 P.3d 1247, 1251 (App. 2005) (no jury trial for interference with judicial proceedings); *Derendal*, 209 Ariz. 416, 104 P.3d 147 (no jury trial for misdemeanor drag racing); *Abuhl v. Howell*, 212 Ariz. 513, 515, ¶ 12, 135 P.3d 68, 70 (App. 2006) (no jury trial for misdemeanor false reporting to law enforcement); *Newkirk v. Nothwehr*, 210 Ariz. 601, 604, ¶ 12, 115 P.3d 1264, 1267 (App. 2005) (no jury trial for allegations of prior convictions); *Raye v. Jones*, 206 Ariz. 189,

191, ¶ 9, 76 P.3d 863, 865 (App. 2003) (no jury trial for misdemeanor underage drinking and driving); *State v. Miller*, 172 Ariz. 294, 295, 836 P.2d 1004, 1005 (App. 1992) (no jury trial for misdemeanor contracting without a license); and *State ex rel. Baumert v. Superior Court*, 127 Ariz. 152, 154-55, 618 P.2d 1078, 1080-81 (1980) (no jury trial for misdemeanor disorderly conduct).

Cases holding that misdemeanors had common law antecedents carrying the right to a jury trial include *State v. Le Noble*, 216 Ariz. 180, 183, ¶ 16, 164 P.3d 686, 689 (App. 2007) (resisting arrest was a common law crime that was jury-eligible prior to statehood, so the defendant was entitled to a jury trial for misdemeanor resisting arrest]); *Urs v. Maricopa County Attorney's Office*, 201 Ariz. 71, 74, ¶ 10, 31 P.3d 845, 848 (App. 2001) (same, misdemeanor reckless driving); *Sulavka v. State*, 223 Ariz. 208, 221 P.3d 1022 (App. 2009) (defendant charged with shoplifting by concealment was entitled to a jury trial because larceny is an antecedent to shoplifting by concealment).

The legislature has also made misdemeanor driving under the influence ["DUI"] offenses jury-eligible by statute. A.R.S. § 28-1381(F) specifically states that in DUI cases, "At the arraignment, the court shall inform the defendant that the defendant may request a trial by jury and that

the request, if made, shall be granted." In *State ex rel. Wangberg v. Smith*, 211 Ariz. 101, 104, ¶ 11, 118 P.3d 49, 52 (App. 2005), the Arizona Court of Appeals held that a defendant charged with misdemeanor DUI is entitled to a jury by including that language "in the very statutes which establish and define misdemeanor DUI offenses."

In short, all criminal jury trials in Arizona require unanimous verdicts. All felony offenses are eligible for jury trials. Determining whether a defendant is entitled to a jury trial for a misdemeanor, however, requires a complex analysis of the common law in existence at the time Arizona's Constitution was established. More litigation will undoubtedly ensue on these issues.

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